2-17-2015

Brief for National Association of Criminal Defense Lawyers as Amici Curiae, Fortino Alvarez v. Randy Tracy

Veronica C. Gonzales-Zamora
University of New Mexico - School of Law

Barbara L. Creel
University of New Mexico - School of Law

No. 12-15788

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FORTINO ALVAREZ
Petitioner-Appellant,
v.

RANDY TRACY, Acting Chief
Administrator for the Gila River
Indian Department of Rehabilitation
and Supervision,
Respondent-Appellee.

Appeal from the United States District Court
for the District of Arizona
Hon. David G. Campbell, United States District Judge, Presiding

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND BARBARA CREEL IN SUPPORT OF PETITION FOR PANEL OR *EN BANC* REHEARING

Tova Indritz
Co-Chair, Native American Justice
Committee, National Association of
Criminal Defense Lawyers
2040 Fourth Street, NW
Albuquerque, NM 87102
(505) 242-4003
F: (505) 243-6735

Barbara Creel
Professor of Law and Director of
Southwest Indian Law Clinic
Univ. of New Mexico School of Law
1117 Stanford Drive, NE
Albuquerque, NM 87106
(505) 277-5265
F: (505) 277- 4367

Counsel for Amici Curiae

February 17, 2015

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND BARBARA CREEL IN SUPPORT OF PETITION FOR PANEL OR *EN BANC* REHEARING

The National Association of Criminal Defense Lawyers, pursuant to Rule 29, Federal Rules of Appellate Procedure, and Barbara Creel, an individual, move the Court for leave to file a brief as *amici curiae* in support of Petitioner-Appellant, Fortino Alvarez. The proposed *Brief of Amici Curiae National Association of Criminal Defense Lawyers and Barbara Creel in Support of Petition for Panel and En Banc Rehearing* is submitted simultaneously with the Motion.

Federal Rule of Appellate Procedure 29(b) requires *amici curiae* to: (1) state their interest, and (2) state the desirability and relevance of the proposed brief. Because *amici*'s proposed brief meets these requirements, amici respectfully request the Court grant their motion.

I. Identity and Interest of Amici Curiae

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct. NACDL supports the right of all persons accused of crime anywhere in the United States to counsel, due process, and fair treatment, regardless of the accused's race or tribal membership. While NACDL recognizes important issues of

tribal sovereignty, it also recognizes the fundamental rights of individual Indians facing incarceration. NACDL is also concerned with the national impact of a decision on this issue.

Barbara Creel, is a Professor of Law and the Director of the Southwest Indian Law Clinic ("SILC") of the University of New Mexico School of Law. She teaches, researches, and practices in the areas of federal habeas, Indian law, and criminal law and procedure. In a clinical education setting, supervising attorneys and students in SILC provide access to justice to Native Americans in state, federal, and tribal courts. Barbara Creel and SILC, as *amici*, have an interest in the issue presented by Mr. Alvarez's petition for rehearing, which is whether an exhaustion requirement applies to tribal defendants seeking habeas corpus review pursuant to 25 U.S.C. § 1303.

II. The Proposed Brief of Amici Curiae is Relevant and Desirable

Amici's brief is relevant because it squarely address the central issue of whether a tribal exhaustion rule ought to apply in habeas proceedings filed under 25 U.S.C. § 1303, and if so, what standards and exceptions apply to allow federal review of a tribal order of detention. *Amici* offer substantial experience in the field of federal habeas corpus, and criminal law in Indian country.

The brief is desirable because it will provide the Court the benefit of the research, legal analysis and experience *amici* bring to this important issue. The

NACDL includes a Native American Justice Committee that is concerned with the rights of Native Americans who are accused of crimes, and has testified before the U.S. Congress and Indian tribal government bodies on those issues.

Barbara Creel, a former Assistant Federal Defender has testified before Congress and the Indian Law and Order Commission on the right to counsel for Native Americans accused of crime in tribal court and on the access to the writ of habeas corpus under ICRA. SILC has also successfully litigated numerous federal habeas corpus petitions under 25 U.S.C. § 1303, and has a unique understanding of the individual rights of defendants *vis- a-vis* their tribe. *Amici* offer a special expertise in Indian law, sovereignty, and civil rights.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request the Court grant their motion to file a brief in support of the Petitioner-Appellant.

Pursuant to Rule 29-3 movant endeavored to obtain the consent of all parties prior to this filing. Daniel L. Kaplan, counsel for petitioner-appellant Fortino Alvarez, consents to the filing of this brief. On Friday. February 13, 2015, Clinical Law Student August-Drew Kanassatega attempted to secure the consent of Randy Tracy, Respondent-Appellee. Mr. Kanassatega spoke with Tom Murphy, Counsel for the Gila River Indian Community regarding the filing of this brief. Mr. Murphy

replied that he would have to discuss the question with his client to the Tribe's position before giving an answer. Mr. Murphy also asked to speak to Professor Creel about the brief. On Friday, February 13, 2015, undersigned counsel Barbara Creel called Mr. Tom Murphy at (520) 562-9764, and left a message requesting the Tribe's position regarding this brief. No response was received. Thus, undersigned counsel has been unable to obtain Respondent-Appellee's consent.

Accordingly, *amici* must seek the Court's leave to file their brief, and respectfully request that leave be granted.

Respectfully submitted on this 17th day of February, 2015,

By: /s/ *Tova Indritz*
Tova Indritz
Co-Chair, Native American Justice Committee, National Association of Criminal Defense Lawyers
2040 Fourth Street, NW
Albuquerque, NM 87102
(505) 242-4003
F: (505) 243-6735

/s/ *Barbara Creel*
Barbara Creel
Professor of Law and Director of Southwest Indian Law Clinic
Univ. of New Mexico School of Law
1117 Stanford Drive, NE
Albuquerque, NM 87106
(505) 277-5265
F: (505) 277- 4367
creel@law.unm.edu

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of February, 2015, I electronically filed the foregoing Motion for Leave to File *Amici Curiae Brief of The National Association of Criminal Defense Lawyers and Barbara Creel In Support of Petition for Panel and En Banc Rehearing* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the appellate CM/ECF system.

By __/s/ *Barbara Creel*_____
Barbara Creel
Professor and Director of SILC

No. 12-15788

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FORTINO ALVAREZ

Petitioner-Appellant,

v.

RANDY TRACY, Acting Chief
Administrator for the Gila River
Indian Department of Rehabilitation
and Supervision

Respondent-Appellee.

Appeal from the United States District Court
for the District of Arizona
Hon. David G. Campbell, United States District Judge, Presiding

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND BARBARA CREEL IN SUPPORT OF PETITION FOR PANEL AND *EN BANC* REHEARING

Tova Indritz
Co-Chair, Native American Justice
Committee, National Association of
Criminal Defense Lawyers
2040 Fourth Street, NW
Albuquerque, NM 87102
(505) 242-4003

Barbara Creel
Professor of Law and Director of
Southwest Indian Law Clinic
Univ. of New Mexico School of Law
1117 Stanford Drive, NE
Albuquerque, NM 87106
(505) 277-5265

Counsel for Amici Curiae

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT

Amicus curiae National Association of Criminal Defense Lawyers ("NACDL") submits the following corporate disclosure statement, as required by Fed. R. App. P. 26.1 and 29(c): NACDL is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

February 17, 2015

/s/ Tova Indritz
Tova Indritz
Counsel for Amicus Curiae
Co-Chair, Native American Justice Committee, NACDL

Amicus curiae Barbara Creel, an individual Professor and Director of the Southwest Indian Law Clinic ("SILC") submits the following corporate disclosure statement, as required by Fed. R. App. P. 26.1 and 29(c): Barbara Creel submits this amici brief as an individual and not on behalf of any organization. The views contained herein have not been endorsed by any organization including University of New Mexico or any of its affiliates.

February 17, 2015

/s/ Barbara Creel
Barbara Creel
Counsel for Amicus Curiae
Professor and Director of SILC

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTERESTS OF *AMICI CURIAE*

I. Identity and Interest of Amici Curiae

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct. NACDL supports the right of all persons accused of crime anywhere in the United States to counsel, due process, and fair treatment, regardless of the accused's race or tribal membership. NACDL recognizes the important issues of tribal sovereignty, and the fundamental rights of individual Indians facing incarceration. NACDL is also concerned with the national impact of a decision on this issue.

Professor Barbara Creel, is the Director of the Southwest Indian Law Clinic ("SILC") at the University of New Mexico School of Law where she teaches, researches, and practices in the areas of federal habeas, Indian law, and criminal law and procedure. SILC provides access to justice to Native Americans in state, federal, and tribal courts. Barbara Creel, and SILC, as *Amici* have an interest in the issue of the exhaustion analysis, requirements and exceptions for tribal defendants seeking habeas corpus review of tribal orders of detention pursuant to 25 U.S.C. § 1303.

II. The Proposed Brief of Amici Curiae is Relevant and Desirable

Amici's brief is relevant because it squarely address the central issue of whether a tribal exhaustion rule ought to apply in habeas proceedings filed under 25 U.S.C. § 1303, and if so, what standards and exceptions apply to allow federal review of a tribal order of detention. *Amici* offer substantial experience in the field of federal habeas corpus, and criminal law in Indian country.

The brief is desirable because it will provide the Court the benefit of the research, legal analysis and experience *Amici* bring to this important issue. The NACDL includes a Native American Justice Committee that is concerned with the rights of Native Americans who are accused of crimes, and has testified before the U.S. Congress and Indian tribal government bodies on those issues.

Barbara Creel, a former Assistant Federal Defender has testified before Congress and the Indian Law and Order Commission on the right to counsel for Native Americans accused of crime in tribal court and on the access to the writ of habeas corpus under ICRA. SILC has also successfully litigated numerous federal habeas corpus petitions under 25 U.S.C. § 1303, and has a unique understanding of the individual rights of defendants *vis- a-vis* their tribe. *Amici* offer a special expertise in Indian law, sovereignty, and civil rights.

Amici affirm that no counsel for a party authored this brief in whole or in part; affirms that no party or party's counsel or no person (other than *amici*, its

members or its counsel) contributed money that was intended to fund preparing or submitting the brief. Fed. R. App. P. 29(c)(5)

Amici sought the consent of the Counsel for Gila River Indian Community's position regarding the filing of this brief, no response was received. All other parties consent to the filing of this brief. Fed. R. App. P. 29(a); 9th Cir. Rule 29-2(a).

SUMMARY OF THE ARGUMENT

The Indian Civil Rights Act ("ICRA") contains no explicit requirement that a person seeking a writ of habeas corpus – the exclusive remedy – must first exhaust tribal remedies. Congress, well aware of the intrusive effect of federal judicial review upon tribal self-government, not only contemplated, but intended to authorize immediate federal via the writ of habeas corpus in 25 U.S.C. 1303. Not only can the Court review a habeas petition directly while respecting tribal sovereignty, it is compelled to so to protect the important individual guaranteed in ICRA. Given the vital liberty interests at stake, the rigid doctrine created by the *National Farmers* line of cases, outside of federal habeas context, have no application and any judicially created rule should be flexible to allow federal review and relief. *En banc* rehearing and reversal is necessary to fulfill the congressional intent of ICRA and prevent the ruling from rendering the ICRA protections meaningless in this case.

ARGUMENT

I. There is No Tribal Exhaustion Requirement in 25 U.S.C. §§ 1301 – 03.

In 1968, Congress specifically and explicitly conferred "the privilege of the writ of habeas corpus…to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1303 (2006). The extensive legislative history of ICRA demonstrates that Congress' provision for habeas corpus relief incorporated a balancing of tribal sovereignty *and* protection of individual rights. *See* Hearings on S. 961–968 and S.J.Res. 40 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. (1965) (proposing and ultimately declining to extend to tribal governments all constitutional provisions applicable to the Federal Government).

The purpose of ICRA was to "secur[e] for the American Indian the broad constitutional rights afforded to other Americans," and "protect the individual Indian from arbitrary and unjust actions of tribal governments." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 60-61 (1978) Congress, aware of the intrusive effect of federal judicial reivew upon tribal self-government, intended to create a limited mechanism for federal court review namely – immediate habeas review via 25 U.S.C. 1303. *Id.* 436 U.S. at 69.

Reviewing this history, Justice White declared:

> The extension of constitutional rights to individual citizens is *intended* to intrude upon the authority of government. And once it has been decided that an individual does possess certain rights vis-à-vis his government, it necessarily follows that he has some way to enforce those rights. Although creating a federal cause of action may "constitut[e] an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself," in my mind it is a further step that must be taken; otherwise, [ICRA] may be meaningless.

Santa Clara Pueblo v. Martinez, 436 U.S. at 83 (dissent). Thus, ICRA struck an appropriate balance between tribal sovereignty and individual rights when it authorized federal court review without a tribal exhaustion rule.

Under the guise of respect for tribal sovereignty, the Panel requires exhaustion of tribal remedies, even where futile or where, as here, the Tribe provides no adequate opportunity for review or remedy. Imposing the strictest exhaustion requirements – equivalent to that under the AEDPA – for tribal members seeking to vindicate individual rights where Congress imposed no such requirement, renders ICRA meaningless.

II. The *National Farmers* Exhaustion Rule Has No Application to the ICRA/Habeas Context.

The Supreme Court established the exhaustion doctrine in *National Farmers* to permit tribal courts to determine their own jurisdiction over a civil matter. The rationale supporting that doctrine does not apply to the habeas context.

As set forth in the dissent, "[this Court] cannot blithely import rules from the civil context to habeas, where vital liberty interests are at stake." *Alvarez v. Tracy*,

773 F.3d 1011, 1030 (9th Cir. 2014) (Kozinski, J. dissenting). First, the *National Farmers Union* civil tribal-court exhaustion doctrine was never meant to address anything but issues of tribal jurisdiction over non-tribal members. In *National Farmers Union*, a non-tribal school board sought a federal injunction to prevent the Crow Tribal Court from executing a default judgment against them. *See National Farmers Union Insurance Co. v. Crow Tribe of Indians*, 471 U.S. 845, 845-846, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985). Petitioners theorized that the federal court had "federal question" original jurisdiction to issue the petition based on 28 U.S.C. § 1331. *Id.* While holding that federal jurisdiction under Section 1331 was properly invoked, the Supreme Court concluded that the bounds of tribal jurisdiction were the product of "relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions," and therefore, an inquiry best undertaken by the tribal court in the first instance. *Id.* Thus, the Supreme Court held that even though Section 1331 encompasses the federal question of whether or not a tribal court has exceeded its lawful jurisdiction, "exhaustion [of tribal court remedies] is required before such a claim can be entertained by a federal court." *Id*. at 857.

Despite the fact that *National Farmers Union* was decided expressly to permit tribal courts to determine their own jurisdiction over a civil matter, this Court and others have incorrectly expanded *National Farmers Union* to require

exhaustion of tribal remedies even in the absence of any challenge to or question regarding the extent of tribal jurisdiction. [1]

III. Vital Liberty Interests at Stake Demand a Flexible Exhaustion Rule.

An appropriate exhaustion analysis would reflect that § 1303's grant of federal habeas review was meant to incorporate a flexible exhaustion rule. *See Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 891 (2nd Cir. 1996) ("[T]he legislative history [of ICRA] suggests that § 1303 was to be read coextensively with analogous statutory provisions."). *See Boozer v. Wilder*, 361 F.3d 931, 934 n.2 (9th Cir. 2004). While the writ of habeas corpus provided for in § 1303 has no directly "analogous statutory provision", it can logically be equated with the "writ of habeas corpus" defined in Title 28 of the United States Code. *See* 28 U.S.C. § 2254. In the habeas context, any exhaustion requirement is more permissive than the "narrow exceptions" in *National Farmers* and its progeny.

A. Exhaustion applies only to remedies available at the time of filing the federal petition.

In *Franklin v. Johnson* this Court held that the federal exhaustion requirement "refers only to remedies still available at the time of the federal

[1] *See Smith v. Moffett*, 947 F.2d 442, 443 (10th.Cir.1991) (holding that comity concerns prevented the federal courts from entertaining a lawsuit filed by a tribal member against his tribe when "the record fails to disclose whether Smith exhausted his tribal remedies"); *Selam v. Warm Springs Tribal Correctional Facility*, 134 F.3d 948, 953 (9th Cir. 1998) (an issue preclusion case holding that a tribal habeas petitioner failed to exhaust his claim because he failed to properly raise it prior to petitioning for federal habeas review).

petition." 290 F.3d 1223, 1231 (9th Cir. 2002) (citing Engle v. Isaac, 456 U.S. 107, 125 n. 28 (1982)) "If a petitioner failed to present his claims in state court and can no longer raise them through any state procedure, state remedies are no longer available, and are thus exhausted. *Id.* (citing *O'Sullivan v. Boerckel,* 526 U.S. 838, 848 (1999)).

Applied to Mr. Alvarez's petition, the *Franklin* flexible approach dictates that Mr. Alvarez need only have exhausted his tribal court remedies that were still available to him at the time he filed his federal petition. Since more than the five days he had to appeal his conviction had passed, no such remedy was available at the time Mr. Alvarez filed his petition, and thus need not be exhausted.

B. Exhaustion is not required where remedies are futile and/or an inadequate opportunity for review.

Remedies available at the time of the filing must be effective and not futile. "That remedies are available in theory, but not in fact, is not synonymous with failure to exhaust remedies. That ineffective and meaningless procedures were available to petitioner does not preclude his seeking a writ of habeas corpus." *Alvarez v. Tracy*, 773 F.3d 1011, 1031 (9th Cir. 2014) (Kozinski, J., dissenting) (quoting *United States ex rel. Cobell v. Cobell*, 503 F.2d 790 (9th Cir. 1974)).

In analogous state habeas petitions under Section 2254(b), exhaustion is not required where a state's procedural requirement "consistently prevents a fairly presented claim from being heard on the merits . . . ." *Kim v. Villalobos*, 799 F.2d

1317, 1321 (9th Cir. 1986) (citations omitted). Other Courts have similarly applied an exception to the exhaustion requirements. *See, e.g. Coleman v. Thompson*, 501 U.S. 722 (1991) (holding that claims not presented to a state court will not be defaulted if 'the prisoner can demonstrate cause for the default and actual prejudice…or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.'); *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (holding that the "ineffective" exception applies "if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief"); *Hoffman v. Arave*, 236 F.3d 523 (9th Cir. 2001) (federal habeas review is not precluded unless 'the defendant has had a reasonable opportunity to have the issue as to the claimed [federal] right heard and determined by the State court').

This Court recognized an analogous exception in the context of a habeas petition from a tribal member. *See United States ex rel. Cobell v. Cobell*, 503 F.2d at 793 (holding that exhaustion principle was applicable but did not preclude father, who lacked meaningful remedy in tribal courts, from petitioning for writ of habeas corpus). This exception has similarly been applied in the tribal context, both before[2] and after[3] *Santa Clara.*

[2] *See e.g. Wounded Knee v. Andera*, 416 F. Supp. 1236 (D.S.D. 1976); *McCurdy v. Steele*, 353 F. Supp. 629 (D. Utah 1973) (concluding exhaustion inappropriate even though petitioners had not exhausted remedies through the Bureau of Indian

In fact, the Gila River Community Appellate procedure was considered futile before this Court: *Johnson v. Gila River Indian Community*, 174 F.3d 1032 (9th Cir. 1999). There, dismissal was inappropriate where the Tribal Appellate Court failed to respond to the notice of appeal for two years. *Id*. Imposing a 5-day deadline after that case not only allowed the tribal court to avoid future federal review as a result of futility, but also to avoid reviewing criminal appeals altogether since it is practically impossible to comply with such a deadline.[4]

Here, a five-day window to appeal a conviction with no access to counsel and no clear tribal procedure for a writ of habeas corpus would similarly satisfy Section 2254(b)'s and ICRAs "ineffective" exception. Because Petitioner's exhaustion is futile and/or an inadequate opportunity for review, the Court's denial

---

Affairs); *Brown v. U.S.,* 486 F.2d 658 (8th Cir. 1973) (tribal members had exhausted after denied an effective timely remedy in the tribal court).

[3] *See e.g. Greywater v. Joshua*, 846 F.2d 486 (8th Cir. 1988) (exhaustion not required where strong evidence that petitioners did not receive a fair hearing in the tribal court); *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980) (parties were refused access to the tribal court, and so without federal jurisdiction the plaintiffs would otherwise be deprived of any remedy); *Sweet v. Hinzman,* 634 F. Supp. 2d 1196 (W.D. Wash. 2008) (denying dismissal of ICRA habeas action because petitioners alleged that no tribal remedies existed).

[4] For a discussion of how the Community's 5-day deadline may not comport with Due Process requirements under ICRA and the United States Constitution, s*ee Randall v. Yakima Nation Tribal Court*: 841 F.2d 897, 900 (9th Cir.1988) (ICRA does not require it, but "when a right of appeal is provided, 'the procedures used in deciding appeals must comport with the demands of the Due Process") (*quoting Evitts v. Lucey*, 469 U.S. 387, 393 (1985)). *See also* ICRA § 202(8) ("Indian tribes shall not "deprive any person of liberty or property without due process.").

of federal review results in manifest injustice. In addition, there is nothing in the record to determine that the appellate branch was operational.

IV. Alternatively, this Court May Remand to Determine whether Petitioner has Available Remedies Rather than Dismiss His Petition.

Should the Court require exhaustion, the record contains an inadequate basis to determine whether exhaustion was met or should be excused. This Court should remand to the district court with instructions to determine whether Mr. Alvarez has an actual, effective, non-futile tribal remedy. *See Vasquez v. Piller*, 220 Fed.Appx. 598, 600-601 (9th Cir. 2007) (remanding to the district court to determine whether the plaintiff properly exhausted one of this habeas claims).

If the district court finds Mr. Alvarez has an actual, effective, non-futile tribal remedy available to him, the district court should stay this case and allow Mr. Alvarez to exhaust those remedies, rather than dismiss Mr. Alvarez's petition. *See Marceau v. Blackfeet Housing Authority*, 540 F.3d 916, 921 (9th Cir. 2008) (recommending district court stay, rather than dismiss action while the plaintiffs exhaust available tribal court remedies). If the district court finds that Petitioner has no remedy, this Court should review the merits of his petition.

Allowing the Community the opportunity to present evidence of an actual remedy or allowing the Petitioner the opportunity to properly exhaust those Community remedies, will respect both tribal sovereignty and Petitioner's individual rights.

CONCLUSION

This Court should rehear Petitioner's appeal *en banc* and reverse the Panel decision, apply the appropriate standard and exceptions to exhaustion analysis to review Petitioner's writ of habeas to protect his important individual rights vis a vis his tribe. Alternatively, this Court should remand to the district court to determine whether there are timely, effective and non-futile tribal remedies.

Respectfully submitted,

/s/ Tova Indritz
Tova Indritz
Co-Chair, Native American Justice Committee, National Association of Criminal Defense Lawyers
2040 Fourth Street, NW
Albuquerque, NM 87102
(505) 242-4003

/s/ Barbara Creel
Barbara Creel
Professor of Law and Director of Southwest Indian Law Clinic
Univ. of New Mexico School of Law
1117 Stanford Drive, NE
Albuquerque, NM 87106
(505) 277-5265

Counsel for Amici Curiae

Dated: February 17, 2015

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 9th Cir. Rule 29-2(c) because: this brief contains 4198 words, or 13 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in font size 14, Times New Roman style.

/s/ Barbara Creel

Dated: February 17, 2015

Barbara Creel
Attorney for Amici Curiae
Professor and Director of SILC

CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2015, I served the foregoing Brief for the National Association of Criminal Defense Lawyers as *Amici Curiae* In Support of Petitioner-Appellant on each party separately represented via the Court's electronic Pacer/ECF system as follows:

Daniel L. Kaplan
Assistant Federal Public Defender
Federal Public Defender's Office – District of Arizona
850 W. Adams Street Suite 201
Phoenix, Arizona 85007

Attorney for Petitioner-Appellant

Linus Everling
General Counsel
Gila River Indian Community – Office of the General Counsel
P.O. Box 97
Sacaton, AZ 85147

Attorney for Respondent-Appellee

Dated: February 17, 2015

/s/ Barbara Creel
Barbara Creel
Attorney for Amici Curiae
Professor and Director of SILC

CERTIFICATE FOR BRIEF IN PAPER FORMAT

Ninth Circuit Case No: 12-15788

I, Barbara Creel, hereby certify that this amicus brief submitted by National Association of Criminal Defense Lawyers and Barbara L. Creel is identical to the version submitted electronically on February 17, 2015.

/s/ Barbara Creel

Dated: March 4, 2015

Barbara Creel
Attorney for Amici Curiae
Professor of Law and Director
Southwest Indian Law Clinic
Univ. of New Mexico School of Law
1117 Stanford Drive, N.E.
Albuquerque, New Mexico 87131
Phone: (505) 277-5265
Facsimile: (505) 277-4367
creel@law.unm.edu